UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

APR 0 7 2010

Pamela Creedon, P.E.
Executive Officer
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, Ste. 200
Rancho Cordova, CA 95670

Dear Ms. Creedon:

Thank you for the opportunity to comment on the proposed Amendments to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control of Methylmercury and Total Mercury in the Sacramento-San Joaquin Delta Estuary, and the accompanying Draft Staff Report, both dated February 2010, and the Draft Staff Report for the Sacramento-San Joaquin Delta Estuary TMDL for Methylmercury, dated February, 2010. We previously reviewed and commented on an earlier version of these documents dated February, 2008. As before, we urge the Central Valley Regional Water Quality Control Board (Regional Board) to adopt the new water quality objectives and TMDLs, with changes as discussed below. Our comments and concerns on the proposed amendments are summarized below, and detailed comments are included in the attachment.

As before, we continue to strongly support your decision to complete TMDLs for methylmercury in the Delta Estuary. These TMDLs use the best available science, and focus on controlling both methylmercury, which is directly linked to methylmercury fish tissue levels, and total mercury, which is a limiting factor in the production of methylmercury. The science supporting these TMDLs clearly indicates that controlling both methylmercury and total mercury will more effectively reduce fish tissue values to safe levels for both wildlife and Delta anglers.

We are concerned the proposed Basin Plan Amendment (BPA) contains TMDLs for the Delta, as currently presented, that are not considered complete under the Clean Water Act (CWA). Specifically, we note the BPA contemplates that Phase 2, implementation of control actions, will begin after stakeholder completion of Phase 1, development of Control Studies. However, language in the proposed BPA indicates that control actions for compliance with allocations is *only* required after formal Board review and action on Phase 1, and Board development of tributary TMDLs. We find these TMDLs to be incomplete if such Regional Board action is required to either confirm or amend the proposed TMDLs for the Delta, and to confirm development of tributary TMDLs. The BPA must be revised to say that Phase 2 control actions will be implemented when appropriate Phase 1 studies have been completed.

The proposed BPA contemplates that compliance schedules for NPDES dischargers will only start at the beginning of Phase 2, after the Board completes a review of the Phase 1 Control Studies. However, this intent is inconsistent with EPA regulations concerning compliance schedules at 40 CFR 122.47 and the State Water Resources Control Board's (State Board's)

2008 Policy for Compliance Schedules in NPDES Permits. Language referring to beginning a compliance schedule in Phase 2 must be deleted. We suggest modifying the BPA to include language stating that when the Phase 1 study is complete, the need to continue a compliance schedule during Phase 2 will be reviewed.

The positions described in this letter and the attachment are preliminary in nature and do not constitute a determination by EPA under Clean Water Act section 303(c) or 303(d). Approval/disapproval decisions will be made by EPA following adoption of the water quality standards and the TMDLs, and submittal to EPA by the State Board.

At the April 2008 public hearing for this package, Regional Board members directed staff to work with stakeholders to resolve concerns about the proposed program. Board staff participated in a facilitated stakeholder process for two years, delaying adoption. A significant amount of limited resources was spent on many stakeholder and workgroup meetings. While this process may have been helpful in resolving some stakeholder issues concerning implementation, the proposed water quality objectives have not changed, and the revised TMDLs are very similar to the original TMDLs. We hope this experience does not set a precedent for future TMDLs; we strongly recommend the Regional Board act expeditiously to adopt the proposed package, and begin the necessary implementation activities to address the impairment in the Sacramento-San Joaquin Delta.

Although the formal stakeholder group purportedly included individuals from all identified categories of stakeholders, the meetings were markedly dominated by those stakeholder groups who were able to expend substantial resources for travel and participation over the two year period. Stakeholder groups with limited resources were at a significant disadvantage, and were not able to have their concerns heard clearly. Participation from all stakeholder groups is essential, including participation from Tribal Nations and community groups representing consumers of fish. Future stakeholder processes must be conducted in a manner that allows all groups to equally participate. We suggest meeting independently with each group, to hear concerns and suggestions.

We appreciate the great deal of work that has gone into the development of the proposed Basin Plan Amendment. We appreciate the opportunity to review and comment. If you have questions, please contact me at (415) 972-3572, or Diane Fleck at (415) 972-3480.

Sincerely,

Jovita Pajarillo for

Alexis Strauss
Director, Water Division

Attachment

U.S. EPA COMMENTS

PROPOSED AMENDMENT FOR THE CONTROL OF METHYLMERCURY AND TOTAL MERCURY IN THE SACRAMENTO-SAN JOAQUIN DELTA ESTUARY, FEBRUARY 2010

I. Modifications to Chapter II (Existing and Potential Beneficial Uses) and III (Water Quality Objectives)

1. Designated Uses: We are pleased to see the COMM use as a proposed "designated beneficial use" for the Delta and Yolo Bypass (proposed BPA, page BPA 1). However, the designation should be clarified as an existing designated beneficial use, to be consistent with the existing REC-1 use which includes recreational fishing. The COMM use is defined as "uses of water for commercial or recreational collection of fish..." (Basin Plan, page II-2.00). Existing use designations should be identified either where the use has taken place or the water quality sufficient to support the use has existed since November 28, 1975, or both (see Advanced Notice of Proposed Rulemaking, 63 Fed Reg 36754). Recreational and commercial fishing is and has been taking place throughout the Delta; thus, an existing use designation is appropriate.

2. Listed Water Bodies: We are pleased to see the tables and figures in Appendix 43, including Table A43-1, which purports to be a comprehensive list of "distinct, readily identifiable water bodies within the boundaries of the 'Legal' Delta (as defined in California Water Code section 12220) that are hydrologically connected by surface water flows (not including pumping) to the Sacramento and/or San Joaquin Rivers" (proposed BPA, page BPA 26). The proposed COMM use, water quality objectives, and TMDLs will apply to these water bodies. This is consistent with the current Clean Water Act (CWA) 303(d) list, which lists all areas of the Delta as impaired for mercury. However, if this is not a comprehensive list of water bodies within the Delta, please identify any missing water bodies and explain why they are not included.

3. Fish Consumption: We are very pleased to see new language under Program Overview on page BPA 2 of the proposed BPA, concerning the long term goal of the mercury program: "to enable people to safely eat four to five meals per week (128 – 160 g/day) of Delta fish." The currently proposed fish tissue objectives protect people eating up to 32 g/day of fish. You note that "[t]he fish tissue objectives will be re-evaluated during the Phase 1 Delta Mercury Control Program Review and later program reviews to determine whether a higher consumption rate can be reasonably attained as methylmercury reduction actions are developed and implemented."

The long term goal of the mercury program is consistent with Executive Order 12898, dated February 11, 1994, entitled, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." This order requires agencies to consider patterns of consumption of fish to ensure the protection of populations that principally rely on fish and/or wildlife for subsistence. Therefore, we strongly support your serious consideration of higher (subsistence) consumption patterns of Delta fish, when you consider revisions to the fish tissue objectives during the Phase 1 Mercury Control Program Review, and later reviews.

II. Modifications to Chapter IV (Implementation)

1. TMDL Elements: The proposed BPA does not contain all the necessary TMDL elements: it does not contain a summary of the TMDLs/loading capacities, numeric targets, linkage analysis, and seasonal variations and critical conditions analysis. The BPA must clearly contain the TMDLs and all allocations (i.e., both load allocations and individual wasteload allocations for each NPDES discharger to the waters covered by the TMDLs.) Table A contains a summary of the current loads and allocations of each source category, for each Delta subarea; Tables B and C contain individual wasteload allocations (WLAs) for NPDES dischargers (wastewater and stormwater, respectively), for each subarea. Table D contains allocations for tributaries to each subarea. **Please include in the BPA, the TMDL for each subarea.** If the total of the allocations for each subarea in Table A is equal to the TMDL/loading capacity for each subarea, please clearly explain this. The remaining elements appear to be included in the BPA Staff Report and/or the TMDL Staff Report, Appendix A to the BPA Staff Report. Please reference these reports in the BPA or the Resolution adopting the BPA, as containing the remaining necessary elements.

2. Wasteload Allocations (WLAs): Tables B and C contain individual WLAs for NPDES dischargers (wastewater and stormwater, respectively). TMDLs must include allocations for all sources, including individual WLAs for all NPDES dischargers. We assume Tables B and C are comprehensive lists of municipal and industrial NPDES dischargers, and stormwater NPDES dischargers, respectively; if not, please include all NPDES dischargers and an individual WLA for each.

3. Attainment of Water Quality Standards: The TMDLs must be set to attain all applicable water quality standards. Please clearly explain in the proposed BPA, or the proposed Resolution adopting the proposed BPA (by reference to Staff Reports, if appropriate), how the final methylmercury allocations and interim total mercury limits for NPDES dischargers will achieve and maintain compliance with the San Francisco Bay Mercury TMDL, water quality standards based on the California Toxics Rule total mercury criteria, and water quality standards based on the new methylmercury fish tissue objectives contained in the adoption package. It is not clear from the proposed BPA that all applicable water quality standards will be attained and maintained.

4. Phase 1 Control Actions: On page BPA-3 of the proposed BPA, it states, "During Phase 1, all dischargers shall implement reasonable, feasible controls for inorganic (total) mercury." Please clarify what is meant by "reasonable, feasible controls." We know this issue was discussed during the stakeholder process, and a consensus could not be reached. However, the Regional Board should clarify what it expects dischargers to implement during Phase 1.

5. Phase 1 Review: It is clear the proposed BPA contemplates that Phase 2, implementation of control actions, will begin after stakeholder completion of Phase 1, Control Studies. However, it appears that control actions for compliance with allocations is only required after formal Board review and action on Phase 1, and Board development of tributary TMDLs. **If Regional Board action is required to either confirm or amend the proposed TMDLs, and to confirm**

development of tributary TMDLs, the TMDLs for the Delta will not be considered complete under CWA section 303(d) until such action has been taken.

The proposed BPA at page BPA 2 states, "At the end of Phase 1, the Regional Water Board shall conduct a Phase 1 Delta Mercury Control Program Review that considers: modification of methylmercury goals, objectives, allocations, and/or Final Compliance Date… the linkage analysis, allocations, and time schedules shall be adjusted at the end of Phase 1, or subsequent program review, if appropriate." The proposed BPA, at page BPA 3, states, "All dischargers shall implement methylmercury management practices identified during Phase 1 that are reasonable and feasible. However, implementation of methylmercury management practices identified in Phase 1 is not required for the purposes of achieving methylmercury allocations until the Regional Water Board has completed the Phase 1 Delta Mercury Control Program Review and has developed the tributary mercury control programs."

As proposed, Phase 2, implementation of control actions to achieve allocations, would be contingent upon the review and formal action of the Regional Board. This means, in effect, that the TMDLs would be implemented only following subsequent Regional Board action. However, once appropriate Phase 1 studies are completed, i.e,. once appropriate management control actions and practices are identified, implementation must begin. The BPA can reference expectations of future Regional Board review and potential revisions to the TMDLs and implementation provisions, but cannot make implementation contingent upon future Board actions. **The BPA must be revised to state that Phase 2 control actions shall be implemented when appropriate Phase 1 studies have been completed.**

6. Allocations Based on Wet Year Data: The proposed BPA at page BPA 3 states that load allocations for tributary inputs, urban areas outside of MS4 service areas, open water habitat, atmospheric deposition, and waste load allocations for the MS4s, are based on relatively dry water year data (2000 through 2003), and that these allocations will be re-evaluated during the review of the Phase 1 Delta Mercury Control Program. We recognize that wet years are likely to generate different results and influence the source analysis which may necessitate revisions to the allocations. Please clarify that allocations will be re-evaluated as wet year data become available during Phase 1, and not during the review of the Phase 1 Program, which will occur at the end of the Phase 1 period, 9 years later or longer.

NPDES

7. New Dischargers: On page BPA 4 of the proposed BPA, it states that, "NPDES permitted facilities that begin discharging to the Delta or Yolo Bypass during Phase 1 shall comply with the above requirements." The requirements limit discharges of inorganic mercury to facility performance-based levels. Please clarify that new dischargers, as defined in the State Water Resources Control Board (State Board's) 2008 Policy for Compliance Schedules in NPDES Permits (CS Policy), who begin discharging to the Delta or Yolo Bypass during Phase 1, are subject to the State Board's CS Policy concerning the new methylmercury fish tissue water quality objectives included in this package, the State Board's Policy for Implementation of

Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP) for existing mercury criteria in the California Toxics Rule (CTR), as well as 40 CFR 40 122.4(i)[1]

8. Unassigned Wasteload Allocations (WLAs): The proposed BPA at Table B includes an "unassigned allocation for NPDES facility discharges" for each subarea. Footnote (d) states that the unassigned WLAs are for new discharges to surface waters that begin after the effective date of the amendment. We strongly support the proposal to include a mass allocation for new and expanded discharges, and to require these discharges to meet the 0.06 ng/l methylmercury concentration levels prior to being assigned a portion of the allocation. However, it is not clear from the language in the footnote, whether the phrase "where the additional allocation does not exceed the product of the net increase in flow volume and 0.06 ng/l methylmercury" applies to only item (3), expansions to existing facilities beyond their allocations listed in Table B, or whether it also applies to items (1), existing facilities that previously discharged to land, and (2), newly built facilities. We assume the phrase applies to all three items; please clarify this. If it does not apply to all three items, please explain why not.

9. Interim Wasteload Allocations (WLAs) and Permit Limits: Final methylmercury WLAs are included in the proposed BPA, and compliance with them must achieved as soon as possible, but no later than 2030, in 20 years. Interim WLAs are not included. Given the extent of time for Phase 1, 9 years with possible extensions, and the total length of 20 years to 2030 to reach final WLAs, we strongly urge the Regional Board to include interim numeric WLAs, in methylmercury and/or total mercury, and to include measurable benchmarks toward reaching final WLAs.

In accordance with the State Board's CS Policy, interim numeric permit limits in methylmercury and/or total mercury must be included, and should reflect measurable benchmarks toward reaching final limits based on the final wasteload allocations.

Language concerning Phase 1 permit limits is contained on page BPA 4 and states that, "all facilities listed in Table B shall limit their discharges of inorganic (total) mercury to facility performance-based levels." Table B lists municipal and industrial wastewater dischargers. EPA, however, expects *all* post-TMDL NPDES permits to contain, at a minimum, interim performance-based numeric limitations that represent a reasonable measure of current performance, and such limits should be in place as soon as they can be calculated. These interim limitations should be calculated using a methodology that is consistent for all the municipal and industrial NPDES dischargers. EPA would support an interim annual mass-based limit calculated using average flow and mass loadings data, with the use of a reasonable statistical allowance for the calculation of a not-to-be exceeded limit. However, we would not support using the design flow for a facility whose flow is substantially under design flow, as this calculation would not be representative of current performance.

Finally, the compliance schedule, if permissible, must be stated as enforceable language in the permit (as soon as possible, but no later than 2030), along with a final water quality-based

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[1] See also 9th Circuit Court of Appeals decision in *Friends of Pinto Creek v. U.S. Environmental Protection Agency*, 504 F.3d 1007 (9th Cir. 2007).

effluent limit (WQBEL). The final WQBEL must be consistent with the final WLA, and could be expressed simply as an annual mass loading equal to the WLA.

10. Compliance Schedules/Phase 2: It appears that the proposed BPA contemplates that compliance schedules for NPDES dischargers will *only* start at the beginning of Phase 2, after the Regional Board completes a review of the Phase 1 Control Studies and takes formal actions (to confirm or amend the TMDL elements, and develop tributary TMDLs). See comment 5. above. The proposed BPA at page BPA 3 states, "Beginning in Phase 2, the Regional Water Board shall, as necessary, include schedules of compliance in NPDES permits for compliance with water quality-based effluent limits based on the wasteload allocations." This intent is inconsistent with EPA regulations concerning compliance schedules at 40 CFR 122.47 and the State Board's CS Policy concerning compliance schedules.

EPA regulations and the State Board's CS Policy require that compliance schedules be as short as possible, but may include time to complete a design study, e.g., a Phase 1 control study (see CS Policy section 6) a): "Any compliance schedule must require compliance as soon as possible, taking into account the amount of time reasonably required for the discharger to implement actions, such as designing and constructing facilities or implementing new or significantly expanded programs and securing financing, if necessary, to comply with a more stringent permit limitation specified to implement a new, revised, or newly interpreted water quality objective or criterion in a water quality standard.").

Based on the foregoing, and because the final WQBELs will not be immediately effective in permits issued or modified while Phase 1 studies are being completed, language referring to commencement of schedules in Phase 2 must be deleted (i.e., delete the phrase "Beginning in Phase 2" from the language quoted above). The Regional Board may include language that it will review the feasibility of NPDES dischargers meeting the final WQBELs after the Phase 1 studies are complete, i.e., it will review its determination of whether a discharger can meet a methylmercury WLA based of reliable data and information to characterize sources, treatment efficiencies, and variability in methylmercury concentrations, and the Phase 1 studies will be necessary to make these determinations. Thus we suggest modifying the BPA to include language stating that when Phase 1 studies are complete, the need for additional time to comply with final WQBELs during Phase 2 will be reviewed.

The State Board's CS Policy also requires the schedule to include interim requirements and dates for their achievement, and that if the CS exceeds one year, the Regional Board shall establish interim numeric limitations, and may also impose interim requirements to control the pollutant (State Board CS Policy, section 7, page 6). These details are appropriate to consider during any permit reissuance after adoption and approval of the TMDLs.

MS4s

11. BMPs: The proposed BPA at page BPA 4, under "Requirements for NPDES Permitted Urban Runoff Discharges," states that MS4 dischargers listed in Table C shall implement best management practices (BMPs) consistent with their existing permits. Either in a control study or a separate plan, all MS4s should be required to demonstrate how BMPs and pollutant minimization measures will effectively reduce total mercury and methylmercury discharges and

quantitatively meet the WLAs (see "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs," Robert H. Wayland III and James A. Hanlon, November 22, 2002, available at http://www.epa.gov/npdes/pubs/final-wwtmdl.pdf.

12. Phase 1 Control Studies: The proposed BPA, starting at page BPA 5, requires various point and nonpoint sources discharging into the Delta, including MS4s, to conduct control studies and develop strategies for complying with the load allocations and WLAs. The proposed BPA allows dischargers seven years (longer under certain circumstances), to submit final reports to the Regional Board. For MS4s, we believe this lengthy schedule overlooks the substantial progress already made in identifying control strategies under their existing NPDES permits. For example, in May 2004, the Sacramento area MS4 permittees submitted a comprehensive mercury control plan to the Regional Board which is similar to the report which would be due within seven years under the proposed BPA. Substantial progress has been made by the Sacramento area MS4 permittees since 2004 in identifying and implementing mercury control strategies, which can be seen in the 2009 annual report submitted to the Regional Board under NPDES permit number CAS082957. Strategies to reduce total mercury discharges will likely reduce methylmercury discharges. Accordingly, we suggest the BPA be revised to require submittal of control study reports for Phase I MS4s (Sacramento, Stockton and Contra Costa County) within a shorter period of time of the BPA's effective date.

Table C of the proposed BPA identifies a number of Phase II MS4s covered by the State Board's general NPDES permit number CAS 000004, and are assigned WLAs. The proposed BPA does not require Control Studies for these MS4s; we recommend the proposed BPA include these entities in its requirement to complete Control Studies. However, these MS4s have been under permit for less time than the Phase I MS4s, and have less experience with stormwater management. As such, we suggest the BPA provide a reasonable time for the Phase II MS4s for submittal of Control Study reports to the Regional Board.

Control Studies

13. Objectives: We suggest adding a requirement to the proposed BPA at page BPA 6, under [Control Study] Study Objectives, that implementation plans and schedules which are submitted by dischargers, provide for compliance with allocations and WLAs at the earliest practicable time. This is consistent with the State Board's CS Policy and with EPA's regulations concerning compliance schedules for NPDES permittees, both of which require compliance with effluent limits as soon as possible. Nonpoint sources should also be required to comply with allocations at the earliest practicable time.

14. Mercury Control Studies Schedules: The proposed BPA at page BPA 8, under Mercury Control Studies Schedules, states that if dischargers do not comply with Control Study implementation schedules, the Executive Officer shall consider issuing individual waste discharger requirements. We suggest clarifying what those requirements might include, and we recommend methylmercury limits consistent with allocations.

15. Adjusting Allocations: The proposed BPA at page BPA 9 says that as part of the Phase 1 Delta Mercury Control Program Review and subsequent reviews, the Regional Board may

consider adjusting allocations to allow methylmercury discharges from existing and new wetland restoration and other aquatic habitat enhancement projects, if certain conditions are met. We support the Board in making appropriate adjustments to allocations based on new information, so long as the assimilative capacity in the water body is not exceeded. Adjustments to allocations between sources are likely to trigger EPA review and approval.

16. Compliance Monitoring: The proposed BPA at page BPA 9, under Compliance Monitoring, says that compliance points for MS4s required to conduct methylmercury monitoring are those locations described in the individual NPDES permits or otherwise determined to be representative of the service area. We recommend requiring that MS4s include a discussion of compliance points in their Control Study.

We also recommend the BPA require monitoring for Phase II MS4s, similar to that which is required for Phase I MS4s at page BPA 9. Since the general NPDES permit for the Phase II MS4s does not require stormwater monitoring, the BPA would need to clarify that monitoring of representative outfalls would be required for Phase II MS4s as is required by the individual MS4 permits for the Phase I MS4s.

Tributary Watersheds

17. Schedule for Tributary TMDLs: The proposed BPA at pages BPA 12 and 13 provides a schedule for completion of tributary TMDLs. Nine water bodies are listed with schedules for TMDL completion through 2017. We are pleased to see this schedule; we support the Board's desire to complete these nine tributary TMDLs in the next seven years.

Mercury Offsets

18. General: EPA's 2003 Water Quality Trading Policy (EPA's Trading Policy) does not allow trading of bioaccumulative pollutants. During its drafting, a limited exception for pilot projects was added, as a result of Region 9's discussions with our Washington, D.C. office concerning the Sacramento Regional County Sanitation District's proposed trading project for mercury.

At page 4, the Policy states: "EPA does not currently support trading of pollutants considered by EPA to be persistent bioaccumulative toxics (PBTs). EPA would consider a limited number of pilot projects over the next two to three years to obtain more information regarding trading of PBTs. EPA believes pilot projects may be appropriate where the predominant loads do not come from point sources, trading achieves a substantial reduction of the PBT traded and where trading does not cause an exceedance of an aquatic life or human health criterion. Based on the findings of these pilot projects, EPA will consider making revisions to its policy."

EPA is cautiously supportive of carefully crafted, limited, individually negotiated offset pilot projects for bioaccumulative pollutants, which include projects for mercury and methylmercury. EPA Region 9 is also cautiously supportive of the Regional Board's adoption of a very carefully drafted and limited methylmercury offset program for the Delta. We applaud Board staff and stakeholder efforts to outline key principles intended to guide the development of such an offset program. Below are our comments on the key principles included in the proposed BPA at page BPA 13. Our comments also consider the detailed workgroup discussions of these principles which are reflected in Appendix E of the Adaptive Management Approach for Implementing the

Delta Methylmercury TMDL (previously, the Memorandum of Intent (MOI) document). Community-based organizations are understandably concerned about any offset or trading program for mercury and/or methylmercury, and we recommend their full involvement in the development of any formal program.

Principle on Net Environmental/Community Benefit: "Offset credits should only be available to fulfill a discharger's responsibility to meet its (waste) load allocation after reasonable control measures and pollution prevention strategies have been implemented."

While EPA agrees with the principle in concept, we strongly recommend the Board clearly define "reasonable control measures." We are aware from workgroup discussions that different stakeholder groups have widely different interpretations of which control measures are reasonable.

(Second) Principle on Net Environmental/Community Benefit: "Offsets should not be allowed in cases where local human or wildlife communities bear a disparate or disproportionate pollution burden as a result of the offset."

EPA strongly agrees with this principle, and we recommend adding specific language that explicitly disallows the creation of localized hot spots. Any proposed pilot project must demonstrate that sufficient assimilative capacity exists in the water body to avoid creating a local hot spot.

Principle on Timing and Durability: "Offset credits should be available upon generation (i.e., when an offset project is implemented) and last long enough (i.e., not expire quickly) to encourage feasible projects."

EPA suggests the Board clarify when a credit will start. EPA strongly believes that credits should only be given after actual reductions of methylmercury loadings have occurred, and not upon implementation of the project. We agree that in order for a project to be feasible, credits must last long enough to be useful, however we strongly caution that credits may not have an infinite timeline, and it may not be permissible to allow them to be carried forward into future permits. EPA's Trading Policy at page 8 states, "Credits should be generated before or during the same period they are used to comply with a monthly, seasonal or annual limitation or requirement in an NPDES permit."

Principle on Measurability (listed in Appendix E): "Alternatives to direct load credits may be developed, such as time extensions to the Final Compliance Date."

In our comment letter dated April 23, 2008, we stated that the use of a time extension through a compliance schedule in lieu of credits does not appear to be consistent with EPA regulations at 40 CFR 122.47, which requires permits to comply with the CWA and regulations as "soon as possible." This principle also appears to be inconsistent with the State Board's CS Policy which requires compliance with WQBELs as soon as possible. We recommend deleting or modifying this provision for NPDES municipal and industrial wastewater discharge sources.

Under the discussion of this principle in Appendix E of the Adaptive Management Approach document, the stakeholder group drafted a sub-principle concerning creative solutions: "Creative solutions may be more useful in the near term, such as additional (i.e., beyond required) monitoring, control studies, or exposure reduction efforts." Although EPA understands stakeholder interest in creating incentives for additional monitoring, control studies, and exposure reduction efforts, the offset program is not the appropriate forum to provide incentives for these activities. EPA strongly believes that only actual load reductions (above an appropriate baseline) should be eligible for pollution reduction credits.

Baseline Conditions: The proposed BPA does not appear to include any key principles concerning baseline conditions. However, Appendix E of the Adaptive Management Approach document describes baseline conditions for generating credits for impaired water bodies. Sub-principles include: "Approved, creditable offset projects may be grandfathered into future TMDLs, Basin Plan Amendments and/or permits."

Grandfathering credits from pre-TMDL projects, after the TMDL is established, would likely be inconsistent with EPA's Trading Policy, if the pre-TMDL baseline was less stringent. At page 5, the Policy states, "After a TMDL has been approved or established by EPA, the reductions made to generate credits for pre-TMDL trading may no longer be adequate to generate credits under the TMDL. This will depend on the remaining level of reduction needed to achieve water quality standards and, where applicable, the allocation of point and nonpoint source pollutant loads established by the TMDL." We recommend amending this provision to make grandfathering conditional on a case-by-case basis provided that it is not inconsistent with EPA's Trading Policy.

(Second) Baseline Conditions: Appendix E also states: "Reductions beyond mandated levels (surplus) should be available to other parties needing credit."

In our prior work with stakeholders over the past several years, EPA has been supportive of possible offset pilot projects that potentially involved one (or a few) generators of credit and one (or a few) buyers of credit. However, EPA is not supportive of full scale trading for mercury or methylmercury, under which there could be numerous buyers and sellers of credit. EPA has many concerns of such a program; one is that under a full scale trading program, it would be difficult to ensure that all participants would adhere to all the limits and constraints that this document puts on the generation and purchase of credits. EPA is especially concerned that under a full scale trading program, it could be difficult to ensure that all dischargers which purchase credits are protecting water quality in the local area to the same level which would have occurred if the discharger did not purchase credits.

Other Concerns: EPA has more detailed and other concerns not mentioned above. Establishing an offset program for mercury and/or methylmercury and determining appropriate projects is complex. We are committed to working with Board staff and stakeholders to facilitate adoption of a workable offset program and appropriate pilot projects.

Exposure Reduction Program

19. March 1, 2010 Program: On March 1, 2010, the Regional Board noticed a revised proposed Exposure Reduction Program for the BPA at pages BPA 13 and 14. The revised Program outlines the development of an Exposure Reduction Strategy, which will propose who should be responsible for developing and implementing an Exposure Reduction Program, and a process for developing, funding, and implementing the Program. Several objectives for the Program are listed.

We support the development of an Exposure Reduction Program to reduce the actual and potential exposure of Delta fish consumers. We support including all stakeholder groups in its development and implementation, since all sources contribute to the impairment. We strongly support including community based organizations and other organizations that represent Delta fish consumers; they may be able to best evaluate the success of potential exposure reduction actions. Exposure reduction activities may be necessary as long as we have elevated methylmercury levels in fish that are consumed.

We note that subsistence fish consumption values, if determined as part of the program, may not be based on current consumption, if current consumption is reduced due to knowledge of contamination. As noted above in comment I. 3., at the end of Phase 1, we support consideration of appropriate adjustments to the fish tissue objectives, to support higher (subsistence) fish consumption in the Delta.

Requirements for Federal Agencies

20. US EPA: The proposed BPA at page BPA 10 states "New wetland, floodplain, and other aquatic habitat restoration and enhancement projects, including but not limited to projects developed, planned, funded, or approved by individuals, private businesses, non-profit organizations, and local, State, and federal agencies such as… U.S. EPA… shall comply with all applicable requirements of this program, including conducting or participating in Control Studies and complying with allocations."

The proposed BPA at page BPA 15 states that U.S. EPA should work with the State Board to develop a memorandum of understanding to evaluate local and statewide mercury air emissions and deposition patterns and to develop a load reduction program.

We intend to work cooperatively with the Regional Board, State Board, and appropriate Federal agencies on any new projects in which we may in some way be involved, concerning the Delta, in compliance with applicable requirements. We will consider proposals for a memorandum of understanding pursuant to applicable laws and policies.

III. Modifications to Chapter V (Surveillance and Monitoring)

1. Fish Methylmercury Compliance Monitoring: The proposed BPA at page BPA 16 states that beginning in 2025, the Regional Board will initiate fish tissue monitoring, and thereafter monitor every 10 years, more frequently as needed. Compliance areas in each of the subareas are listed, and details concerning representative fish species and lengths for different trophic levels are included. Minimum sample sets are described.

While we strongly support the compliance program, we recommend fish tissue monitoring begin before 2025 (15 years from now), and more frequently than every 10 years. We recommend fish tissue compliance monitoring on a 5 year basis, and where significant changes in methylmercury or total mercury concentrations or loadings are occurring, on a yearly basis. Changes in methylmercury in fish can vary on a yearly basis. Compliance monitoring on a 10 year basis would not allow the Board to determine whether changes in strategy are necessary, in a timely manner.

2. Water Methylmercury and Total Mercury Compliance Monitoring: The proposed BPA at pages BPA 16 and 17 states that sources for irrigated agriculture discharges and for managed wetlands shall develop monitoring strategies (and determine compliance points) for mercury and/or methylmercury as part of their Phase 1 Control Study. NPDES facilities will conduct monitoring for mercury and methylmercury, and as required in their NPDES permits. Similar requirements are included for MS4s.

We support requiring these sources to develop reasonable and appropriate monitoring strategies as part of their Phase 1 studies or as part of their NPDES permit. We expect that monitoring frequencies will be consistent with the need for data as part of their Control Study to determine appropriate control actions.